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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 FREDDY GONZALEZ, JR., J-40996,
12 Plaintiff,
13 vs.
14 J. PARTIDA; S. RUTLEDGE; and A.
15 LEWIS,
Defendants.

CASE NO. 12cv2153-WQH-
KSC
ORDER

16 HAYES, Judge:

17 The matter before the Court is the review of the Report and Recommendation
18 (ECF No. 16) issued by United States Magistrate Judge Karen S. Crawford,
19 recommending that Defendants' Motion to Dismiss the Complaint (ECF No. 11) be
20 granted and the Complaint (ECF No. 1) be dismissed.

21 **BACKGROUND**

22 On August 30, 2012, Plaintiff Freddy Gonzalez, Jr., a state prisoner currently
23 incarcerated at Calipatria State Prison and proceeding pro se, filed a "Complaint under
24 the Civil Rights Act, 42 U.S.C. § 1983" ("Complaint"). (ECF No. 1). Plaintiff alleges
25 that Defendants J. Partida, S. Rutledge, and A. Lewis ("Defendants") used excessive
26 force against Plaintiff in violation of Plaintiff's Eighth Amendment right to be free from
27 cruel and unusual punishment. *See id.* at 2-3.

28 On January 25, 2013, Defendants filed the Motion to Dismiss the Complaint

1 pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 11). Defendants
2 contend that the Complaint should be dismissed as to J. Partida for failure to exhaust
3 administrative remedies, and dismissed as to S. Rutledge and A. Lewis for failure to
4 state a claim upon which relief can be granted.

5 On April 8, 2013, Plaintiff filed an opposition to the Motion to Dismiss the
6 Complaint. (ECF No.14). Plaintiff contends that he has exhausted his administrative
7 remedies as to his Eighth Amendment claim against Defendant J. Partida. Plaintiff
8 “acknowledges that the Complaint lacked sufficient details to describe Defendants
9 Rutledge and Lewis’ involvement,” but contends that these claims “can be remedied by
10 amendment.” *Id.* at 3, 5-6.

11 On April 17, 2013, Defendants filed a reply in support of their Motion to Dismiss
12 the Complaint.

13 On August 16, 2013, the Magistrate Judge issued the Report and
14 Recommendation. (ECF No. 16). The Magistrate Judge recommended that the Court
15 grant the Motion to Dismiss Plaintiff’s claim against Defendant J. Partida with
16 prejudice for failure to exhaust administrative remedies. The Magistrate Judge
17 recommended that the Court grant the Motion to Dismiss Plaintiff’s claims against
18 Defendants S. Rutledge and A. Lewis without prejudice and with leave to amend. The
19 Report and Recommendation provided that any objections must be filed no later than
20 August 30, 2013.

21 On August 20, 2013, Defendants filed an Objection. (ECF No. 17). Defendants
22 agree with the Magistrate Judge’s recommendation that the Complaint be dismissed as
23 to Defendant J. Partida with prejudice. Defendants contend that the Magistrate Judge
24 erred in recommending that the Complaint be dismissed as to Defendants S. Rutledge
25 and A. Lewis without prejudice and with leave to amend. Defendants contend that
26 Plaintiff “should not be permitted to amend the Complaint against [Defendants]
27 Rutledge and Lewis merely because he also failed to state a cognizable claim for relief
28 against them.” *Id.* at 1.

1 On August 29, 2013, the Court granted Plaintiff an extension of time to file any
 2 objections to the Report and Recommendation, and instructed Plaintiff to file any
 3 objections no later than September 30, 2013. (ECF No. 19). The docket reflects that
 4 Plaintiff has not filed any objections to the Report and Recommendation.

5 **REVIEW OF THE REPORT AND RECOMMENDATION**

6 The duties of the district court in connection with a report and recommendation
 7 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28
 8 U.S.C. § 636(b). The district judge must “make a de novo determination of those
 9 portions of the report ... to which objection is made,” and “may accept, reject, or
 10 modify, in whole or in part, the findings or recommendations made by the magistrate.”
 11 28 U.S.C. § 636(b). The district court need not review de novo those portions of a
 12 Report and Recommendation to which neither party objects. *See Wang v. Masaitis*, 416
 13 F.3d 992, 1000 n.13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th
 14 Cir. 2003) (en banc).

15 After review of the Report and Recommendation, the Complaint, and the
 16 submissions of the parties, the Court finds that the Magistrate Judge correctly set forth
 17 the legal standard for evaluating a motion to dismiss for failure to exhaust pursuant to
 18 the Prison Litigation Reform Act of 1995 (“PLRA”). *See* 42 U.S.C. § 1997e(a) (“No
 19 action shall be brought with respect to prison conditions under section 1983 of this title,
 20 or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
 21 facility until such administrative remedies as are available are exhausted.”). The
 22 Magistrate Judge correctly stated that “[a] prisoner cannot satisfy the exhaustion
 23 requirement ‘by filing an untimely or otherwise procedurally defective administrative
 24 grievance or appeal.’” (ECF No. 16 at 3 (*Woodford v. Ngo*, 580 U.S. 81, 83-84 (2006))).
 25 The Magistrate Judge correctly found that Plaintiff “submitted an untimely appeal to
 26 the appeals coordinator [at Calipatria State Prison] on April 8, 2011,” several months
 27 after the 15-day deadline that was in place when his claim arose, and that his appeal was
 28 “rejected and canceled.” (ECF No. 16 at 4-5 (citing Decl. Nava at 3, ECF No. 11-4)).

1 The Magistrate Judge correctly concluded that “Plaintiff has not submitted anything to
 2 overcome Defendants’ evidence showing Plaintiff failed to timely exhaust his
 3 administrative remedies.” *Id.* at 7. The Court adopts the recommendation of the
 4 Magistrate Judge to Dismiss the Complaint as to Defendant J. Partida with prejudice
 5 and without leave to amend.

6 In light of Plaintiff’s acknowledgment that the Complaint “does not include
 7 enough allegations to state a claim against Defendants S. Rutledge and A. Lewis,” the
 8 Magistrate Judge correctly recommended that the Motion to Dismiss the Complaint as
 9 to Defendants S. Rutledge and A. Lewis be granted. *Id.* at 8. The Magistrate Judge
 10 correctly stated that, “[a]lthough improbable, it is possible that Plaintiff could amend
 11 his Complaint to state an Eighth Amendment cause of action against Defendants S.
 12 Rutledge and A. Lewis.” *Id.* Accordingly, the Magistrate Judge correctly
 13 recommended that such dismissal be without prejudice and with leave to amend.

14 CONCLUSION

15 IT IS HEREBY ORDERED that: (1) the Report and Recommendation is
 16 ADOPTED in its entirety (ECF No. 16); and (2) the Motion to Dismiss the Complaint
 17 is GRANTED (ECF No. 11). The Complaint (ECF No. 1) is DISMISSED with
 18 prejudice and without leave to amend as to Defendant J. Partida, and DISMISSED
 19 without prejudice and with leave to amend as to Defendants S. Rutledge and A. Lewis.

20 **No later than forty-five (45) days from the date of this Order**, Plaintiff may
 21 file a first amended complaint. If Plaintiff files a first amended complaint, the pleading
 22 must be complete in itself, and may not incorporate by reference any prior pleading.

23 DATED: September 30, 2013

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 25 **WILLIAM Q. HAYES**
 26 United States District Judge
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